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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 496

NOAH DIETRICH, *Petitioner*

v.

CAROL DIETRICH, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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NOAH DIETRICH, *Petitioner*

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CAROL DIETRICH, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Noah Dietrich, petitioner herein, prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of California, entered in this case on September 25, 1953.

OPINION BELOW

For the convenience of the Court, the opinion of the Supreme Court of the State of California is printed as *Appendix I* to this petition.

BASIS OF JURISDICTION

The judgment of the Supreme Court of the State of California was entered on September 25, 1953 (R. 119). A Petition for Rehearing (R. 128) was denied by that court without opinion on October 22, 1953 (R. 147).

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code. Although the judgment sought to be reviewed affirmed only an order awarding alimony *pendente lite,* nevertheless, the judgment is so "final" under California law that it is entitled to full faith and credit. *Sistare* v. *Sistare,* 218 U.S. 11. For the convenience of the Court, a short memorandum on the "finality" of this judgment is printed as *Appendix II* to this petition.

In accordance with the third paragraph of Rule 12(1) of the Rules of this Court, the following specific information is given:

Carol Dietrich (respondent herein) sued Noah Dietrich (your petitioner) for separate maintenance. In the trial court Noah contended that any "purported marriage" between them was void because at the time thereof Carol was the legal wife of Harold Moore. Carol claimed a Nevada divorce from Moore. Noah then offered to prove (*primarily* by letters in Carol's own handwriting) that the alleged Nevada decree was void for want of jurisdiction (R. 40-52). The trial judge rejected his offer of proof on the grounds that the Nevada decree was entitled to full faith and credit under Article IV, Section 1 of the United States Constitution (R. 52). For the convenience of the Court, petitioner's offer of proof and the trial court's ruling thereon are printed as *Appendix III* to this petition.

On appeal, petitioner assigned this ruling on the Full Faith and Credit Clause as error (R. 88-90); he also claimed that he was entitled to the protection of California Civil Code, Section 150.1 which is Section 1 of the Uniform Divorce Recognition Act[1] (R. 53-55).

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[1] "A divorce [from the bonds of matrimony] obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced." (The words in brackets are omitted in Section 150.1 of the California Civil Code.) California regards its Uniform Divorce Recognition Act as constitutional. *Huntington* v. *Huntington,* 262 P. (2d) 104 at 107 (1953).

The California Supreme Court refused to apply Section 1 of the Uniform Divorce Recognition Act. It specifically held that since, at the time of his purported marriage to Carol he had knowledge of the factual circumstances under which she had procured her Nevada divorce, Noah was barred from even questioning the validity of his marriage to Carol (R. 124).

In a Petition for Rehearing, Noah charged that he had been denied equal protection of the laws of California because the California courts: (1) had refused to apply its Uniform Divorce Recognition Act in his case (R. 129-134); (2) had, in his case only, retroactively created a valid marriage based on his consent, although the State of California by its Civil Code Section 55 has specifically decreed that marriage cannot be based on consent alone (R. 137); and (3) had deprived him of his cause of action to annul a void California marriage although the substantive law of California[2] grants such a right of action even to a guilty party despite the defense of estoppel and unclean hands (R. 134-137). Noah claimed denial of due process of law under Amendment XIV, Section 1, United States Constitution, asserting that, since the trial court erroneously concluded that the mandate of Full Faith and Credit under

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[2] *Anderson* v. *Anderson*, 7 Cal. (2d) 265 (1936); *Sullivan* v. *Sullivan*, 219 Cal. 734 (1934).

California Civil Code Section 61 reads in part:

"A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved. • • •"

California Civil Code Section 90 reads in part:

"Marriage is dissolved: • • •

2. By the judgment of a court of *competent jurisdiction* decreeing a divorce of the parties." (Emphasis ours.)

California Civil Code Section 80 reads:

"Either party to an incestuous or void marriage may proceed, by action in the Superior Court, to have the same so declared."

Article IV, Section 1, United States Constitution barred inquiry into the jurisdictional validity of the Nevada decree, the action of the California Supreme Court in affirming the order of the trial court *without remand,* took away from him his right to be heard before a court which correctly understood and exercised its constitutional authority (R. 138-145).

SUMMARY STATEMENT

This case does not now, nor has it ever, involved a dispute over facts. This controversy concerns only the application of Federal constitutional principles to undisputed facts.

The legal issues result from the rejection of an offer of proof. Respondent asserted and the trial court concluded that the United States Constitution denied petitioner the right to prove that his marriage to respondent was void.

Carol Dietrich (respondent herein) sued Noah Dietrich (your petitioner) for separate maintenance. Noah cross-complained and alleged that any "purported marriage" between them was bigamous and void because of the fact that at the time of any "purported ceremony" Carol was the lawful wife of one Harold Moore. Carol claimed a Nevada divorce from Moore. Noah then offered to produce evidence (by questions propounded to Carol herself and from letters in Carol's own handwriting) which would conclusively prove that the alleged Nevada decree was void for want of jurisdiction. Carol objected to the questions asked her; her objections thereto were sustained. Noah then made a formal offer of proof (which is printed as *Appendix III* hereto). Carol objected to the offer of proof and the trial judge formally sustained her objections. In such offer of proof Noah offered to prove the following facts:

Carol, domiciled in California, went to Nevada for the "purpose" of securing a Nevada divorce (R. 42); she had

been sent to Nevada by her "Boss", a prominent Los Angeles lawyer (R. 42; 151); she then intended to marry petitioner and reside in Texas (R. 43); she described her presence in Nevada as a "sojourn" (R. 43). During her "sojourn" in Nevada, Carol lived at a hotel, took her meals out, engaged in no employment and did nothing but knit, read and sunbathe (R. 43); she left the State of Nevada several times during her so-called six weeks "residence", although she knew this would defeat Nevada jurisdiction (R. 44-45) and she produced a corroborating witness to her "residence" whom she knew would be willing to commit perjury (R. 45). Noah recommended that she sue for divorce in Texas where she intended to make her permanent home (R. 42), but Carol selected Nevada because it would "all be over in seven weeks" (R. 42). Noah had nothing to do with selecting the Nevada forum, paid none of Carol's expenses and did not participate or assist in the Nevada proceedings (R. 42; 50-51; 127).

The defendant in the Nevada proceedings, Harold Moore, also domiciled in California, was not served with process personally nor by publication, was never present in Nevada, did not appear and admit jurisdiction, and he did not appear and contest jurisdiction. Carol caused an appearance to be made for Moore under a power of attorney (R. 50), and she paid the expenses, legal fees and court costs for Moore. The Nevada proceedings did not cost Moore one cent (R. 51).

Carol alleged in her Nevada *complaint* that she had been a bona fide resident of Nevada for six weeks (R. 174). She *testified* in the Nevada court that when she came to Nevada she intended to make Nevada her home and permanent place of residence and that that had been her intention ever since (R. 46-47; 179). The Nevada court by its judgment found that the allegations of respondent's *complaint* were true (R. 176). It did not find that respondent's *testimony* was true. The Nevada court did not otherwise find or adjudge that it had jurisdiction (R. 176).

Within the hour of testifying under oath before the Nevada court at 9:45 a.m. that she intended to make her permanent home in Nevada, respondent sent a telegram reading in part:

> ". . . Am all finished and leaving on noon train due Los Angeles nine-forty-five tonight but running late . . ." (R. 48; 172)

Respondent caught the noon train and never returned to the State of Nevada (R. 48). Noah did not know that there was any legal question regarding the validity of his purported marriage to Carol until about a month prior to the trial in the trial court (R. 50).

Having sustained Carol's objection to Noah's offer of proof, the trial judge then ordered him to pay her alimony, attorney's fees, and other benefits which have accrued to date in an amount exceeding *$80,500* and which will continue to accrue at a rate in excess of *$2,750* per month. The Supreme Court of the State of California affirmed the order of the trial court.

The judgment of the Supreme Court of the State of California is now final and under such judgment Noah is obligated to pay Carol the sums ordered without any redress except by the grant of this petition for a Writ of Certiorari (See Appendix II attached hereto).

QUESTIONS PRESENTED

1. Did the California trial court have the authority under the Full Faith and Credit Clause of the United States Constitution (Article IV, Section 1) upon the proof offered, to inquire, at the request of a second spouse, into the jurisdictional validity of the Nevada divorce decree:

   A. By virtue of the California Civil Code Section 150.1 (Section 1 of the Uniform Divorce Recognition Act)?

B. Because the doctrine of res adjudicata enunciated in *Sherrer* v. *Sherrer,* 334 U.S. 343 and *Coe* v. *Coe,* 334 U.S. 378 does *not extend* to strangers to the Nevada action and does *not include* a subsequent spouse in litigation involving a different subject matter?

C. When there are no Nevada decisions forbidding a second spouse from attacking such decree in Nevada for want of jurisdiction?

D. In view of the fact that the Nevada judgment did not adjudge that the Nevada court had jurisdiction?

E. In view of the fact that the defendant in the Nevada divorce action: (1) was not domiciled in Nevada, (2) was not served with process personally nor by publication, (3) did not appear and consent to jurisdiction, (4) did not appear and contest jurisdiction, but (5) the plaintiff in the Nevada action caused an appearance to be made for the defendant under power of attorney, and paid all of his expenses, legal fees and costs?[3]

2. If the answer to any subdivision of Question 1 above is "yes", did the Supreme Court of the State of California deny to the petitioner due process of law under the United States Constitution, Amendment XIV, Section 1, by affirming the judgment of the trial court without remanding the case, because, since the trial judge erroneously concluded that the mandate of the Full Faith and Credit Clause barred inquiry into the jurisdictional validity of the Nevada decree, its action thereby took away from him his right to be heard before a court which correctly understood and exercised its constitutional authority?

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[3] Petitioner asserts that the case of *Moore* v. *Moore* was not even an action because the plaintiff therein in effect sued herself.

3. Did the State of California deny to petitioner herein the equal protection of the laws under the United States Constitution, Amendment XIV, Section 1:

A. By failing to apply in this case California Civil Code Section 150.1 (Section 1 of the Uniform Divorce Recognition Act)?

B. By imposing upon him all of the obligations of a valid marriage based upon his alleged consent to a purported ceremony when the State of California has decreed by its Civil Code Section 55 that a marriage may not be based upon consent alone?

C. By decreeing that he was estopped to assert that his California marriage was void and thereby depriving him of his cause of action to annul a void marriage, although the substantive law of California grants such a right of action even to a guilty party despite the defense of estoppel and unclean hands?

D. By decreeing that a defendant could prove on an Order to Show Cause that his purported ceremonial marriage to plaintiff was void if such defense could be "readily" proven but such a defendant could not do so if such defense could not be "readily" proven?

4. Assuming, as the record clearly shows, that he did *not* participate in respondent's conduct in procuring a fraudulent, collusive and void Nevada divorce decree from her first husband, is petitioner (a second spouse) barred by the Full Faith and Credit Clause of the United States Constitution (Article IV, Section 1) from attacking the validity of his alleged marriage to respondent, simply because he knew at the time of their purported marriage ceremony of the circumstances under which respondent had procured the Nevada decree? (A substantially similar question was expressly reserved in *Cook* v. *Cook*, 342 U.S. 126 at 129.)

REASONS FOR GRANTING THIS PETITION

On numerous occasions, this Court has dealt with problems arising out of the application of the Full Faith and Credit Clause to migratory divorces. It has settled many such questions; however, in the case of *Cook* v. *Cook*, 342 U.S. 126 at 129, it explicitly left open and undecided a fundamental question presented by this case.

At the end of its opinion in *Cook* v. *Cook, supra*, the Court expressly announced that it was reserving the question whether a second spouse would be in a position to attack a Florida decree collaterally if the decree were found to be collusive and if the second spouse were found to have participated in the fraud. In the case at bar, the second spouse (petitioner) did *not* participate in the fraud on the Nevada court yet the California Supreme Court has barred him from proving that respondent obtained her Nevada decree by perpetuating a fraud on the Nevada court as to its jurisdiction and as to the appearance of the defendant in the Nevada proceedings. Accordingly, an important Federal question on which this Court reserved judgment has been erroneously answered by the California Supreme Court. This Court should grant the Writ of Certiorari herein requested in order to answer correctly this Federal question.

Furthermore, the California court's judgment in this case is in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Hobbs* v. *Hobbs*, 197 Fed. (2d) 412 (1952), certiorari denied 344 U.S. 855 and with the decision of the Supreme Court of the State of New Jersey in *Staedler* v. *Staedler*, 6 N.J. 380, 78 A. (2d) 896 (1951). In these cases appellate courts have held that the trial courts in their jurisdictions have the authority, under the Full Faith and Credit Clause, to inquire into the validity of the defendant's appearance in the foreign action. In the case at bar the California court held that it did not have authority to even hear or consider

petitioner's proof of the fraud which respondent perpetrated on the Nevada court and by virtue of which she obtained her Nevada divorce decree.

The California decision herein is also in basic conflict with the spirit of the decision of the United States Court of Appeals for the Third Circuit in *Alton* v. *Alton*, No. 11087, decided October 15, 1953. In that case the Third Circuit invalidated a statute of the Virgin Islands which attempted to give the courts of that jurisdiction the power to grant a divorce without a bona fide matrimonial domicile and only upon a mere appearance of the defendant and six weeks residence of the plaintiff. In the case at bar the California Supreme Court *refused* to apply the California Uniform Divorce Recognition Act (California Civil Code, Section 150.1) which has decreed that the sole test for giving force and effect to a foreign decree of divorce is a bona fide matrimonial *domicile* within the state rendering the decree.

The existing decisions of this Court have not "said the last in this area."[4] "Just where the line is to be drawn is not yet certain."[5] They have left open the question of whether or not a divorce decree is entitled to recognition under the Full Faith and Credit Clause where the parties have practiced an active fraud on the court.[6] One state has declared that such a divorce decree is not entitled to recognition under the Full Faith and Credit Clause even though the original parties to the action have no standing to so assert.[7] The basic question of whether or not the doctrine of res judicata enunciated in *Sherrer*

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[4] Erwin N. Griswold, "Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study" 65 Harvard Law Review, 193 at 216 (1951).

[5] *Davis* v. *Davis*, 259 Wisc. 1, 47 N.W. (2d) 338 at 341 (1951).

[6] 65 Harvard Law Review 193 at 217 (1951).

[7] *Aberstein* v. *Aberstein*, 217 Ark. 80, 228 S. W. (2d) 615 (1950).

v. *Sherrer,* 344 U.S. 343, and *Coe* v. *Coe,* 334 U.S. 378, extends to strangers who are not in privity is still unanswered. Language heretofore used by this Court in *Sherrer* v. *Sherrer, supra, Coe* v. *Coe, supra, Johnson* v. *Muelberger,* 340 U.S. 581, and *Cook* v. *Cook,* 342 U.S. 126 would appear to apply the doctrine of res judicata to cases in which the defendant was personally served in the foreign jurisdiction, personally appeared and consented to jurisdiction, or personally appeared and contested jurisdiction, or "participated" in the foreign action, and would imply that such doctrine of res judicata would *not* apply to a perfunctory appearance. The court of last resort of at least one state so interpret the decisions of this Court.[8]

The questions here presented are of national importance because this California decision has expressly and adversely decided the precise question which the Commissioners on Uniform State Laws believe has not been determined by this Court and which they state the Uniform Divorce Recognition Act was designed to answer, to wit: the right of a second spouse to attack a decree of divorce rendered by a court which had no jurisdiction of the matrimonial domicile.[9] The decision of the California Supreme Court on this vital Federal question is in conflict with the decision of the Supreme Judicial Court of Massachusetts in *Old Colony Trust Company* v. *Porter,* 324 Mass. 581, 88 N.E. (2d) 135 (1949).

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[8] *Davis* v. *Davis, supra,* footnote 5.

[9] "... However, these cases [*Sherrer* v. *Sherrer* and *Coe* v. *Coe*] cover a very narrow situation, and, because of their radical departure from the prior decisions of the Supreme Court which they do not purport to overrule, cannot be regarded as extending to situations materially differing in any substantial degree from those presented by the Sherrer and Coe cases. The following situations either are clearly outside the scope of these cases or cannot be said conclusively to be within their scope until further decisions are made: * * * 8. The divorce decree is assailed, in the state of original domicil, by one who (a) was not a party to the action in the foreign jurisdiction or (b) does not stand in the place of such a party . . ." 9 Uniform Laws Annotated 368 (Commissioner's Note to Section 1 of the Uniform Divorce Recognition Act.)

The constitutional authority of eight states[10] to deal with the migratory divorces (which they regard as a growing evil) through the Uniform Divorce Recognition Act is fundamental in this case. A statement by this Court on this constitutional question is imperative in order to protect all potential future second spouses who will reside in those eight states which by statute have declared that a bona fide matrimonial domicile is the *sine qua non* of a valid decree of divorce and prerequisite to a valid second marriage.

This case, moreover, involves basic questions of equal protection of the laws and due process of law. These additional problems, treated in detail under "Questions Presented", will be urged by petitioner if a Writ of Certiorari is granted.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that his request for a Writ of Certiorari be granted.

Respectfully submitted,

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[10] California
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New Hampshire
North Dakota
Rhode Island
South Carolina
Washington
Wisconsin

APPENDIX I

Opinion of the Supreme Court of the State of California

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Filed September 25, 1953

L. A. 22352

CAROL DIETRICH, *Plaintiff and Respondent,*

v.

NOAH DIETRICH, *Defendant and Appellant.*

Plaintiff Carol Dietrich brought an action for separate maintenance against her alleged husband, Noah Dietrich. Noah answered, admitting a "purported marriage ceremony" but claiming that there was no valid marriage be cause at the time of the ceremony Carol was the wife of another; i.e., was not validly divorced from a previous husband. Noah also cross-complained, seeking an annulment, or, in the alternative, a divorce. Carol obtained an order to show cause and, after hearing, the trial court

ordered, among other things, that Noah pay $10,000 on account of her attorneys' fees, $2,750 monthly for her support pendente lite, and certain property taxes and insurance premiums. Noah appeals from those portions of the order. He does not attack an award of $750 monthly for the support of the three minor children of himself and Carol.

Noah contends that (1) the trial court erred to his prejudice in rejecting offered proof intended to show that his marriage to Carol was invalid because her previous divorce was invalid; (2) if it is assumed that it had jurisdiction to award temporary support, the trial court erred in fixing the amount of such award. We have concluded that these contentions are without merit.

The parties went through a California marriage ceremony on May 23, 1936, one day after the entry in Nevada of a decree which recited that Carol was granted a divorce from Harold Moore. At the hearing on the order to show cause in the present California divorce proceeding Noah made the following offer of proof to show that at the time of the California marriage ceremony Carol was not legally divorced from Moore: Carol accepted Noah's proposal of Marriage in September, 1935, while she was still married to Moore. She knew that Noah was a legal resident of Texas and she planned that after she divorced Moore and married Noah she would leave California and make her home in Texas. On April 4, 1936, Carol and Moore were both legal residents of California. On that day she went to Nevada for the sole purpose of simulating a residence and obtaining a divorce. During the period between April 4, 1936, and May 22, 1936, she frequently wrote to Noah; her letters, among other things, referred to her intention to make Texas her permanent home after their marriage, described her stay in Nevada, as a "sojourn", referred to the obtaining of a divorce as "the purpose of my trip," and discussed Noah's arrangements for their contemplated

honeymoon voyage. During this same period Carol made several overnight visits to Los Angeles, and on one trip remained in Los Angeles for more than twenty-four hours, despite the fact that before she left California for Nevada she had written Noah that "As I understand the Nevada requirements, I couldn't possibly return here for even a day after establishing my residence there . . . It wouldn't do to run any risk of later having it declared invalid." In obtaining the Nevada decree Carol used a power of attorney from Moore; Moore was never present in Nevada during the period from April 4 to May 22, 1936; and Carol paid all the expenses of the Nevada action.

Noah also offered to prove that he "learned for the first time that there was some question regarding the legality of the Nevada divorce . . . in November, 1951" (Carol instituted this action November 13, 1951); however, there is no question that Noah knew of the above described circumstances under which Carol obtained the Nevada decree.

The only portion of the offered proof which the trial court admitted in evidence was an exemplified copy of the judgment roll of the Nevada action. This copy shows that Moore, by Nevada counsel, appeared and answered, denying Carol's allegation that she was a bona fide resident of Nevada, and that the Nevada court found that such allegation was true. The trial court in the present proceeding rejected the balance of the offered proof upon three stated grounds: (1) Noah's conduct in connection with Carol's obtaining the Nevada decree estops him from attacking it. (2) Noah cannot attack the Nevada decree because he is not a party to or interested in it. (3) Noah is precluded from attacking the decree by the full faith and credit clause (U. S. Const., art. IV. §1).

Carol urges that the evidence was properly excluded for the reasons stated by the trial court and also urges that, regardless of the correctness of those stated grounds, once

a ceremonial marriage is established then "in any and all events under those circumstances she is entitled to alimony pendente lite."

It may be stated as a general rule that ordinarily if a ceremonial marriage is shown, and if the ceremony is followed by the assumption of marital relations, no further proof of the fact of marriage need be made in preliminary proceedings in order to sustain an award of temporary alimony, court costs and attorneys' fees, and an extended inquiry into close questions as to the validity of the marriage will not be, and need not be, allowed in such preliminary proceedings. Fundamentally, as declared in *Colbert* v. *Colbert* (1946), 28 Cal. 2d 276, 279, "The existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance. [Citations.] And the invalidity of the marriage, as is true of any jurisdictional prerequisite, may be shown at any time." And as pointed out in *Carbone* v. *Superior Court* (1941), 18 Cal. 2d 768, 771-772, "Even though the defendant in an action for divorce denies the existence of the marriage, the court may nevertheless make the order if defendant is given an opportunity to be heard and the marriage is proved by a preponderance of the evidence . . . Although such an order implied a finding of the existence of the relationship, the proceeding need not be so complete nor the evidence so extensive as upon the trial of the issues of the case and the order therefore does not determine those issues nor affect the final judgment. [Citations.]"

The above stated general rule does not mean, however, that the mere showing that the words of a marriage ceremony have been said, absolutely and in all events precludes a defendant on an order to show cause from being heard in challenge of the fact of marriage. Absurb results could follow if we accepted Carol's broad contention that in no event, on the hearing of an application for temporary ali-

mony and suit money, can evidence tending to show the invalidity of an admitted ceremonial marriage be received; for example, a spouse could be required to pay temporary alimony even though he or she could show—and offered to show conclusively—that in the very same court the marriage now relied on had been previously annuled at the instance of the other spouse by a judgment which had become final and that such spouse had remarried. To absolutely exclude such evidence simply because of the fact that the parties had once participated in a ceremony of marriage would deny verity to the substance of the rule, as stated in the Carbone case, that "Even though the defendant in an action for divorce denies the existence of the marriage, the court *may* nevertheless make the order *if defendant is given an opportunity to be heard and the marriage* is proved by a preponderance of the evidence." (Italics added). An opportunity "to be heard" means an opportunity to contest. To give full effect to the rule for which Carol contends would mean that the opportunity of an adverse party to be heard would be satisfied and concluded if he or she were permitted to be present when the one seeking temporary alimony produced an authenticated copy of a recorded certificate of marriage of the parties. Since, as stated in the Carbone case, *supra* (at p. 772 of 18 Cal. 2d), the adverse party, in response to an application for temporary support in a paternity or divorce action, "must be given an opportunity to be heard and to present his evidence . . . [although] [t]he resulting judgment is temporary in effect," it appears that in any given situation it must depend on the facts of the case whether evidence relating to the fact of marriage, and, in particular, evidence tending to show that a ceremonial marriage in fact amounted to no more than a marriage ceremony (i.e., was a mock marriage or, for any conclusive and readily provably reason was wholly void or had already been annulled or dissolved) may be properly excluded.

In *Bancroft* v. *Bancroft* (1935), 9 Cal. App. 2d 464, 468, the District Court of Appeal quoted with approval from *Brinkley* v. *Brinkley* (1872), 50 N. Y. 184, 193, as follows: " 'And the principle at the bottom is this: Where, marriage in fact being denied, the affirmative is upon the party claiming to be the wife[1] to show that an actual marital relation ever existed, there alimony will be denied until that fact is proven to the satisfaction of the court, or is admitted; for it is upon the existence of that relation alone that the right to alimony depends. Where an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact, there alimony will be granted until that fact is shown; for the relation actually exists upon which the right to alimony depends, and the object of the litigation is to annul that actual relation by showing some other fact, the existence of which is denied. It may be said, too, that for the purposes of an application for temporary alimony there will not be need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action. It is for the interest of society and in aid of public policy that, where the married relation has been in fact assumed . . . and where it is averred by the putative wife and denied by the alleged husband, if she makes a reasonable plain case of its existence, she should be furnished with means of temporary support and of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the case.' " (See also 35 Am. Jur. 226, 227, § 70)

Applying the above stated principles, which we adopt, to the present case, since it appears that there was a ceremony of marriage coupled with an actual and bona fide as-

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[1] In California, since the rights and obligations of husband and wife are mutual and reciprocal (Civ. Code, § 137), the principles stated apply interchangeably to either husband or wife as the case may be.

sumption of marital relations, and considering the character of the attack on the validity of the marriage, it is obvious that the exclusionary ruling was proper and may be sustained at this stage of the proceedings on this ground alone.

There is, however, another and more fundamental ground which not only is controlling at this stage of the proceedings but presumptively will be controlling on the trial as well. On this record it is immediately obvious that the very evidence offered to show the invalidity of the ceremonial marriage was properly excluded because that same evidence shows that Noah is estopped to asset the claimed invalidity of the Nevada divorce. With full knowledge of the circumstances under which that divorce was obtained, and in reliance on such divorce, Noah went through a marriage ceremony and lived with Carol as her husband for many years. The public policy of this state, in the circumstances of this case, as in those considered in *Rediker* v. *Rediker* (1950), 35 Cal. 2d 796, 808, required recognition of the second marriage rather than the "dubious attempt to resurrect the original" marriage. (See also *Watson* v. *Waston* (1952), 39 Cal. 2d 305, 307.)

Noah urges that the public policy applicable here is stated in section 150.1 of the Civil Code, which provides that "A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced." But we are not considering the "force or effect" of the Nevada decree except as such consideration is necessarily incident to the holding that Noah, because of his conduct with relation to that decree, has no standing to question it.

Since we have determined that Noah's offer of proof shows that he is estopped to question the Nevada decree, it is unnecessary, either in respect to the order directly concerned or for the guidance of the court at the trial on the

merits, to pass upon the correctness of the other stated grounds of the trial court's exclusionary ruling.

Noah claims that the amount awarded for support is excessive, beyond his ability to pay, and does not take into account Carol's separate income. The total annual amount which Noah is required to pay for support of Carol and the children (including insurance and county taxes on the home where Carol and the children live) is $49,030.61. According to the wife's questionnaire, necessary expenses of herself and the children are $5,028.85 monthly and her separate income is $1,100 monthly. There is evidence that these figures are substantially correct. Noah's net income for 1950, after payment of income taxes, was $197,139.32; the expense of maintaining the family, with Noah living in the family home (from which he has since moved), was $85,567.76. An increase of about $20,000 in taxes for the year 1951 was expected. According to the husband's questionnaire, his necessary annual expenses total $14,820.

If the above figures are accepted it appears that Noah would have the ability to pay the amount awarded. His contention that he did not have such ability is based in part upon a view of his estimated income less favorable than that accepted by the trial court and in part upon considering the award of attorney fees as if it were part of the support award.

Noah is correct in his statement of the proposition that a wife is not entitled to temporary alimony when she has independent income sufficient to enable her to support herself. (*Loeb* v. *Loeb* (1948), 84 Cal. App. 2d 141, 146; *Spreckels* v. *Spreckels* (1952), 111 Cal. App. 2d 529, 533.) But he does not show that the trial court ignored this rule. The monthly amount of the award for support is approximately $4,087. As stated above, Carol offered evidence that the amount required was approximately $5,028.85. Thus the total amount available to her, with her own separate income of $1,100, is approximately the amount which

she requested and testified that she required. From this we may assume that the trial court took into account her separate income when it fixed the amount of the award.

Noah complains that the award of $10,000 on account of Carol's attorneys' was excessive. The situation is similar to that in *Pope* v. *Pope* (1951), 107 Cal. App. 2d 537, 539: "In determining the amount of a reasonable fee the trial court is permitted to consider various factors: The nature of the litigation, its complexity, the nature and extent of the contest, the amount involved, the financial circumstances of the parties, the skill required, the professional standing and reputation of the husband's attorneys and of the attorneys selected by the wife, are some of the relevant matters to be considered. [Citations.]"

Here the litigation is complicated and vigorously contested; the amounts involved are considerable (according to the wife's questionnaire the net worth of community property exceeds $2,500,000; according to the husband's questionnaire his net worth is $1,014,626); and the standing and ability of counsel are high.

For the reasons above stated the order appealed from is affirmed.

SCHAUER, J.

WE CONCUR:

GIBSON, C. J., SHENK, J., TRAYNOR, J., SPENCE, J.

I CONCUR IN THE JUDGMENT: EDMONDS, J.

Concurring and Dissenting Opinion

I concur in the conclusion reached, but dissent from that part of the opinion which holds that the defendant may not, *on the trial of the case,* offer proof of the invalidity of the plaintiff's divorce from her first husband.

The existence of an estoppel is a question of fact, (10 Cal. Jur. 656; *Gump* v. *Gump,* 42 Cal. App. 2d 64; *Assets Corporation* v. *Perrin Properties,* 48 Cal. App. 2d 220; *Judelson* v. *American Metal Bearing Co.,* 89 Cal. App. 2d 256) and the burden of proof is on the party asserting the doctrine (*Garrett* v. *Cook,* 89 Cal. App. 2d 98).

The vital principle of equitable estoppel is that he who by his language or conduct leads another to do *what he would not otherwise have done* shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Four things are essentail to the application of the doctrine: (1) *The party to be estopped must be apprised of the facts;* (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) *the other party must be ignorant of the true state of facts;* (4) the other party must rely upon the conduct to his injury. Defendant's offer of proof showed that plaintiff went to Nevada for the sole purpose of obtaining a decree of divorce; that she did not remain in that state continuously for the six week' period of residence which is the jurisdictional prerequisite demanded by that forum; that the defendant did not know, prior to November, 1951, of the invalidity of the Nevada judgment of divorce awarded to plaintiff from her first husband; that there is no evidence that defendant aided, assisted, or counseled plaintiff to procure a decree of divorce in Nevada. An ob-

jection was sustained by the trial court to this offer of proof. Plaintiff offered no evidence controverting defendant's allegations. It would appear to me that on the record here the first element of an estoppel is missing—that the party to be estopped must be apprised of the facts—in that defendant did not know of the invalidity of the Nevada divorce; the second element is present—defendant married plaintiff intending that his conduct be acted upon; the third element is missing—plaintiff was not ignorant of the true state of facts; the fourth element is probably present—plaintiff relied upon the marriage to defendant although the element of injury is problematical. Upon the trial, if defendant is permitted to litigate the question, plaintiff will also be permitted to introduce evidence which may have the effect of supplying the missing elements.

In previous cases where one spouse has been held estopped from denying the validity of a previous divorce, additional elements have been present. The estopped spouse has aided, abetted, counseled, or actively participated by paying the expenses, etc. in the procurement of the fraudulent divorce. In *Rediker* v. *Rediker*, 35 Cal. 2d 796, 806, we said "The doctrine of estoppel has also been held applicable to cases in which a husband sought to assert the invalidity of his or his wife's earlier divorce from another as a defense to her action for divorce and alimony." Cited as authority are *Margulies* v. *Margulies*, 109 N. J. Eq. 391, 392 (157 A. 656) and *Van Slyke* v. *Van Slyke*, 186 Mich. 324, 330 (152 N.W. 921). Both of these cases held estopped a spouse who had *actively* participated in the procurement of a fraudulent divorce which he later sought to have declared invalid. I feel, therefore, that under the facts as here presented, this Court should not preclude defendant from offering proof at the trial of the invalidity of plaintiff's Nevada decree of divorce.

While I feel that in view of the services rendered, the amount awarded is excessive, I do not feel that I should

say that the award of attorney's fees in this case is an abuse of discretion.

A ceremonial marriage between plaintiff and defendant having been established the court could properly exercise its discretion in making a preliminary award of alimony pendente lite, attorneys' fees and costs without hearing evidence as to the invalidity of the marriage, reserving to the trial on its merits the consideration of such evidence.

I therefore, concur in the affirmance of the award.

CARTER, J.

APPENDIX II

Memorandum of Law on the "Finality" of the Judgment Involved in This Case

I

THE JUDGMENT HERE INVOLVED IS A FINAL JUDGMENT UNDER CALIFORNIA LAW

A. An Application for Temporary Alimony is a proceeding for a separate judgment independent of the ultimate judgment.

1 Cal. Jur. 966: Alimony Section 20

B. Order for Temporary Alimony must be reviewed by separate appeal therefrom.

Stoner v. *Superior Court*, 67 Cal. App. (2d) 760, 155 P. (2d) 697 (1945).

C. Order for Alimony becomes final without regard to judgment in main proceedings.

St. Laurent v. *St. Laurent*, 35 Cal. App. (2d) 345 (1939)

D. When time for Review on Appeal has expired it is a Final Judgment and may *not* be modified as to accrued amounts.

Miller v. *Miller* 175 Cal. 797 (1917)

E. Upon failure to pay the judgment, judgment debtor may be sentenced to jail for contempt and his property subject to execution.

In Re Risner 67 Cal. App. (2d) 806, 155 P. (2d) 667 (1945) (Contempt);
California Code of Civil Procedure, Sec. 1007;
California Civil Code, Section 140;
The Biltmore Drug Store v. *Superior Court*, 161 Cal. App. 363; 281 P. 710 at 809 (1929) (Execution).

II

THE JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT

Sistare v. *Sistare*, 218 U.S. 11;
Dreesen, v. *Dreesen*, 31 Cal. App. (2d) 479, 88 P. (2d) 223 (1939).

APPENDIX III

Petitioner's Offer of Proof in the Trial Court and Ruling of the Trial Judge Thereon

(R. 40-52)

Mr. Loring: Pursuant to conference in chambers with Court and counsel, I understand that counsel are willing to stipulate that I may make an offer of proof without the necessity of having the particular witness on the witness stand. Is that correct?

The Court: Is it so stipulated?

Mr. Belcher: Yes.

Mr. Loring: In view of the rulings of the Court, I should like to make an offer of proof at this time.

The Court: You may do so.

Mr. Loring: I offer to prove by this witness and/or the defendant Noah Dietrich the following facts:

That this plaintiff was married to Harold Moore at Portland Oregon, on October 26th, 1930—and in support of that point, I will at a later time, offer a certified copy of the marriage record between this plaintiff and Harold Moore;

I offer to prove that the plaintiff was employed as a legal secretary in a Los Angeles law office for at least ten years prior to April 4th, 1936;

That on April 4th, 1935, the plaintiff and her husband, Harold Moore—excuse me. That on April 4, 1936, the plaintiff and her husband Harold Moore were both residents of the State of California, and they were not residents of the State of Nevada;

I offer to prove that in the month of September, 1935, the plaintiff and her husband, Harold Moore, were living separate and apart, and that during that month, the defendant in this proceeding proposed marriage to the plaintiff, Carol Hoyt Moore, and she accepted the proposal, and the defendant then gave the plaintiff an engagement ring;

I offer to prove that prior to September of 1935, the plaintiff had known the defendant for in excess of ten years; she knew in September of 1935, at the time she accepted his proposal of marriage, that he was an executive of the Hughes Tool Company, that his permanent place of residence was in Houston, Texas;

I offer to prove that as early as September of 1935, the plaintiff and the defendant discussed marriage in the Spring of 1936, and that they would go to Honolulu for a honeymoon; I offer, in support of the offer of proof, a letter from the plaintiff to the defendant in the plaintiff's handwriting, labeled "Tuesday," which was sent in 1935, referring to the proposed honeymoon trip to Honolulu.

I don't know how the Court wants to handle these documents, whether they should be assigned exhibit numbers for identification at this time or not.

The Court: Perhaps it would be more convenient.

Mr. Loring: I think it would make a better record, your Honor.

The Court: That is the first offer of real evidence, is it?

The Clerk: D.

The Court: Defendant's D-1 for Identification. Perhaps they can all come in under one exhibit number, and separately numbered.

Mr. Loring: Yes. A, B, C, or something like that?

The Court: You have A, B, and C.

Mr. Loring: Oh.

The Court: We will mark this D-1 for Identification only.

Mr. Loring: I offer to prove that in the Spring of 1936, when the plaintiff and the defendant in this proceeding discussed the possibility of the plaintiff securing a divorce from her husband, Harold Moore, the defendant suggested to her that she go to the State of Texas, where they intended to make their home after their marriage, and procure a divorce from the—from her husband in the State of Texas; to which the plaintiff objected, and insisted upon going to the State of Nevada for the purpose of securing a divorce, because the entire matter would be over in seven weeks. And in support of that, I offer a letter in the handwriting of the plaintiff, labeled at the top "Saturday," which was sent to the defendant in March of 1936.

The Court: D-2 for Identification.

Mr. Loring: I offer to prove that the plaintiff originally intended to go to the State of Nevada for the purpose of procuring a decree of divorce from her husband, Harold Moore, in the month of March, 1936, but that her plans were delayed and disarranged because her employer had to make a trip to Florida; and as an accommodation to him, she postponed her trip to Nevada until the month of April.

And in support of that, I offer two letters, one dated "Monday—March 9th," and one dated "Tuesady—March 10," both of which are in the handwriting of the plaintiff, and which were sent to the defendant in the month of March, 1936.

The Court: You are offering those separately, or are they joined together?

Mr. Loring: I think joined together, your Honor.

The Court: Two letters, to be marked D-3 for Identification only.

Mr. Loring: I offer to prove that the plaintiff went to the State of Nevada on April 4, 1936, without any intention of

making Nevada her permanent home, but solely for the purpose of establishing a simulated residence for the purpose of procuring a divorce, and that the attorney who represented her in the Nevada divorce proceedings was Attorney Frank McNamee.

And in support of that, I offer a document referred to by the witness a few moments ago which bears at the top notation "Tuesday Afternoon," which is entirely in the handwriting of the plaintiff and sent to the defendant in the month of April, 1936.

The Court: D-4.

Mr. Loring: I offer to prove that prior to going to the State of Nevada, the plaintiff intended to make her residence, after her divorce and after her marriage to the defendant, in the State of Texas.

And in support of that point, I offer a letter from the plaintiff to the defendant bearing the notation at the top, "Thursday—Feb. 20th," which is entirely in the handwriting of the plaintiff, sent to the defendant in the month of February, 1936, with particular reference to the post script at the bottom of the letter, which states that she is studying "—my map of Houston. Thank you for sending it."

And further offer to prove that the defendant sent the plaintiff shortly prior to February 20th of 1936, a map of the City of Houston in order that she would be better acquainted with the city in making here residence there.

The Court: Defendant's D-5 for Identification.

Mr. Loring: I offer to prove that during the period April 4, 1936, to May 22, 1936, while the plaintiff was living in the State of Nevada, in Las Vegas, she then lived at a hotel; she ate her meals at commercial restaurants and cafes; she did not engage in any employment; she—and that her activities consisted primarily in reading books, sun bathing and sewing, that she owned no property in the State of Nevada;

I offer to prove that the plaintiff, during her stay in the State of Nevada, referred to her stay simply as a sojourn.

And in support of that offer, I offer a two-page document with the notation, "Wednesday" at the top, or a three-page document, which is entirely in the handwriting of the plaintiff, sent by the plaintiff to the defendant in the month of March, 1936.

The Court: D-6 for Identification.

Mr. Loring: As further evidence of the intention of the plaintiff during the period April 4th, 1936, to May 22, 1936, to immediately marry the defendant in this case as soon as she could procure a Nevada divorce, I offer a letter from the plaintiff to the defendant, with the notation at the top, "Thursday Noon," which is written entirely in the handwriting of the plaintiff, and sent to the defendant during the month of April, 1936, in which she announces her declaration that she did not intend to remain a divorcee.

The Court: D-7 for Identification.

Mr. Loring: As further evidence of the intention of the plaintiff not to make the State of Nevada her permanent place of residence during the period April 4, 1936, to May 22, 1936, I offer a two-page document with the date March 20th, 1936, written entirely in the handwriting of the plaintiff, and sent to the defendant during the month of March, 1936, in which she announces her declaration that she was going to love Houston.

The Court: D-8 for Identification.

Mr. Loring: As further evidence of the intention of the plaintiff to marry the defendant during the period April 4, 1936, to May 22, 1936, I offer a letter dated "Monday—April 13th," which is entirely in the handwriting of the plaintiff, sent to the defendant during the month of April, 1936, in which she declares that she is fairly flaunting her engagement ring from the defendant, discusses their proposed Honolulu honeymoon, and other statements regarding the proposal and the intended marriage.

The Court: D-9 for Identification.

Mr. Loring: I offer to prove that during the period April 4, 1936, to May 22, 1936, the plaintiff made at least four visits to the City of Los Angeles, staying overnight on each occasion; and on one of the four occasions, she remained in Los Angeles for more than twenty-four hours. And this conduct, despite the fact that the plaintiff knew that under the laws of the State of Nevada, she could not be absent from the State for more than twenty-four hours.

In support of that, I offer a letter from the plaintiff to the defendant with the notation at the top, "Thursday—March 12th," which is entirely in the handwriting of the plaintiff, sent to the defendant in the month of March, 1936, in which she states her understanding of Nevada law.

The Court: D-10 for Identification.

Mr. Loring: As evidence of the trips which the plaintiff made to the City of Los Angeles during the period April 4, 1936, to May 22, 1936, I offer two letters, one dated "Tuesday—April 14th," the other dated "Wednesday," both of which are entirely in the handwriting of the plaintiff, sent by the plaintiff to the defendant in the month of April, 1936.

The Court: Those two, you are offering as one?

Mr. Loring: Yes.

The Court: To be marked D-11 for Identification.

Mr. Loring: I offer to prove that during the period April 4, 1936, to May 22, 1936, the defendant was making arrangements for the Honolulu honeymoon, after the intended marriage between plaintiff and the defendant, and that on Monday, April 20th, 1936, the plaintiff wrote the defendant a letter in which she stated:

"Noah, will you fill in the necessary information on the pink forms—the stateroom and my permanent address—(which I'd like to have be yours)—and anything else it needs."

The Court: D-12 for Identification.

Mr. Loring: I offer to prove that the so-called corroborating witnes for the testimony of the plaintiff on May 22nd, 1926, was a man named Murray Wollman, who was the operator of the hotel in which the plaintiff was living in Las Vegas during the period April 4, 1936, to May 22, 1936.

I offer to show the plaintiff's characterization of that corroborating witness and his willingness to commit perjury with reference to the question of residence, and offer in support a letter in the handwriting of the plaintiff to defendant, with the notation at the top, "Saturday," which is entirely in the handwriting of the plaintiff and sent to the defendant in the month of May, 1936.

The Court: D-13 for Identification.

Mr. Loring: As further evidence of the state of mind of the plaintiff and of her intention to—not to make the State of Nevada her permanent home during the period April 4, 1936, to May 22, 1936, I offer four letters; one dated "Tuesday," which was sent by the plaintiff to the defendant on or about May 12, 1936, entirely in the handwriting of the plaintiff.

The Court: Four letters?

Mr. Loring: Yes.

The Court: D-14 for Identification.

Mr. Loring: I offer a further letter entirely in the handwriting of the plaintiff, sent to the defendant on or about April 28, 1936, entirely in the handwriting of the plaintiff.

The Court: D-15.

Mr. Loring: I am offering them separately, your Honor.

The Court: You are offering them separately? D-14, you are offering as one letter?

Mr. Loring: Yes. I characterized a group of four letters.

The Court: D-15.

Mr. Loring: I also offer a letter entirely in the handwriting of the plaintiff, which was sent to the defendant on or about April 29, 1936, as further evidence of her state of mind and intention.

The Court: D-16.

Mr. Loring: I offer as further evidence of the plaintiff's state of mind, a letter dated "Tuesday—April 21st," 1936, entirely in the handwriting of the plaintiff and sent to the defendant on or about that date.

The Court: D-17.

Mr. Loring: I offer to prove that on May 19, 1936, the plaintiff came to the City of Los Angeles, and then and there applied with the defendant for a license to marry.

And in support of that, I offer a certified copy of their application for a license to marry.

The Court: D-18.

Mr. Loring: I offer to prove that on May 22, 1936, the plaintiff, in the Eighth Judicial Court of the State of Nevada, in and for the County of Clark, gave the following testimony in connection with a purported divorce proceeding, at about the hour of 9:45 A. M.:

"Q. Where do you reside? A. In Las Vegas, Nevada.

Q. How long have you resided in Las Vegas? A. Since April 4, 1936."

Q. From and including that date to and including May 19, 1936, the date of the filing of this action, were you physically present each and every day in the State of Nevada? A. Every day except one day.

Q. When you were gone that one day did you leave with the intention of returning without undue delay? A. Yes.

Q. And you did so return? A. Yes.

Q. When you came to Las Vegas, Nevada, on April 4, 1936, did you come with the intention of making it your home and permanent place of residence? A. Yes, sir.

Q. That has been your intention ever since that time? A. Yes."

And in support of that, I will offer, for the limited purpose of proving that testimony, and exemplified copy of what I believe to be the entire Judgment Roll and transcript of the proceedings in the Nevada action.

The Court: That will be received and marked defendant's 19. This includes the Judgment Roll as well as the testimony?

Mr. Belcher: Now, what was the number of that?

The Court: 19.

The Clerk: D-19.

The Court: Yes, D-19.

Mr. Loring, does that document you handed the clerk include the whole of the Judgment Roll?

Mr. Loring: The whole of the Judgment Roll.

The Court: And all testimony?

Mr. Loring: And all testimony, is my understanding. I offer to prove—

Mr. Mahl: Just a minute, Mr. Loring, if I may interrupt. For the purpose of the record, are you offering the entire Roll, or only the portion of it that you have read?

Mr. Loring: Well, I am offering the entire document, because it is one document, and it is exemplified. But, I am offering it for the limited purpose of proving the testimony which I just quoted.

The Court: It will be marked D-19 for Identification only.

Mr. Mahl: What was the number of that?

The Court: D-19.

Mr. Loring: I offer to prove that within approximately one hour after giving that testimony under oath in the Nevada court, this plaintiff sent the defendant a telegram at 10:53 A. M. on May 22, 1936, reading as follows:

"Your wire was sweet. Am all finished and leaving on noon train due Los Angeles nine-forty-five tonight but running late, lovingly—Carol."

And I offer the original of the telegram.

The Court: D-20.

Mr. Loring: I offer to prove that the plaintiff did take the noon train from Las Vegas on May 22nd, 1936; that she arrived in Los Angeles the evening of May 22nd, 1936; that

she went through a marriage ceremony with the defendant at Redondo Beach, California, the morning, I believe it was, of May—or, the afternoon of May 23rd, 1936;

That she never again returned to the State of Nevada at any time after May 22nd, 1936.

I offer to prove that on the evening of May 23, 1936, the plaintiff and the defendant went to Honolulu on a honeymoon; that they returned to Los Angeles on June 11, 1936;

That after a few weeks visit with relatives here in Los Angeles, they went to Houston, Texas, where they made their permanent place of residence from 1936 until July of 1950.

I offer to prove that from September, 1935, to May 23rd of 1936, the plaintiff continuously intended to marry the defendant, intended to make her permanent home in Houston, Texas; at no time during that period did the plaintiff ever intend to make a permanent home in the State of Nevada; and that her testimony on May 22, 1936, that she intended to make Nevada her permanent home was perjured testimony given with the intent to deceive the Nevada court into awarding her a purported decree of divorce.

That completes the offer of proof.

May I have just a moment, your Honor, to make certain that that completes the offer of proof?

The Court: Yes.

Mr. Loring: I think that completes the offer of proof, your Honor.

Mr. Mahl: For the purposes of the record, if your Honor please, may we ask Mr. Loring: If we understand, the purpose of this offer is merely for the purpose of attacking the validity of the Nevada decree, is that correct?

Mr. Loring: No, it is not, Mr. Mahl; it is for the purpose of showing that there is no legal marriage between the plaintiff and the defendant to this action.

Mr. Mahl: By reason, if I understand you, of the divorce in Nevada not being valid, is that correct?

Mr. Loring: By reason of the fact that on May 23, 1936, at the time of the ceremony with the defendant, the plaintiff was then and there the legal wife of a man to whom she was married in 1930.

Mr. Belcher: Your offer of proof goes to no other purpose, other than the validity of the marriage between the parties now before the Court, is that correct?

Mr. Loring: That is correct.

The Court: And that the Court shall not consider the various items of the offer which may be proper for other purpose in making the ruling, is that correct?

Mr. Loring: That is correct.

Mr. Mahl: Well, now, if your Honor please, we have no objection to any portion of Defendant's Exhibit Number D-19 for Identification, except the transcript of testimony. That is the exhibit regarding the Nevada divorce, if your Honor will recall. We have no objections to any portion of D-19 except the transcript of testimony.

The objections are renewed upon the grounds previously stated, and in view of counsel's statement in making his offer of proof, they are further objected to upon the grounds that the defendant in this case would be estopped, by his own actions, as stated by counsel, from attacking the validity of the decree. And upon the further basis, suggested by Mr. Belcher, that if the Court now receives the portions of D-19 with the exception of the transcript of testimony, the—it is incompetent, irrelevant and immaterial; and upon all of the grounds that I have previously stated.

The Court: I understand—

Mr. Mahl: The receipt of the portion of D-19 that I have indicated—to which we have no objection, would show that it is a case in which both parties appeared, That is the Nevada case.

The Court: D-19 appears to be a photostat, gentlemen. I understand there is no objection to the form?

Mr. Mahl: None.

The Court: Then it may be considered by the Court as though it were a true authentication of the Nevada decree, is that correct?

Mr. Loring: Well, it is exemplified your Honor.

The Court: Oh, it is exemplified?

Mr. Loring. It is an exemplified document.

The Court: I hadn't seen it. I thought it was a photostat of an exemplification.

Mr. Loring: No. I think an exemplification itself is the the original.

Mr. Belcher: We are raising no issue as to the proper authentication and the certification of the documents contained in that exhibit, your Honor, D-19.

Mr. Loring: I knew that I would have overlooked some elements of my offer of proof, and I would like to supplement it if I may.

The Court: You may do so.

Mr. Loring: I also offer to prove that the defendant in this action, Noah Dietrich, had no knowledge or information prior to the month of November, 1951, regarding the invalidity of the plaintiff's divorce from Harold Moore in the State of Nevada.

In other words, that this defendant, Noah Dietrich, learned for the first time that there was some question regarding the legality of the Nevada divorce from this—between this plaintiff and her former husband for the first time in November, 1951.

I also offer to prove that this plaintiff caused an appearance to be entered in the Nevada action on behalf of Harold Moore by means of a power of attorney executed by Harold Moore; that he was never—that he, Harold Moore, was never personally within the State of Nevada at any time during the dates April 4, 1936, to May 22, 1936; and that this plaintiff paid the expenses, legal fees, and court costs for Harold Moore, and that that divorce proceeding did not cost Harold Moore one cent.

The Court: Anything further, gentlemen?

Mr. Belcher: Your Honor is willing to accept that objection in that form, are you?

The Court: Yes. The record—

Mr. Belcher: Without the necessity of repeating all of the grounds?

The Court: The record will so show.

Excepting as to Exhibit D-19, the objection is sustained. Would it be helpful to either side for the Court to state the basis for—

Mr. Belcher: Well, now, as to D-19, your Honor, we objected to that portion of it which contains the transcript of testimony being received by the Court.

The Court: That's correct. As to the transcript of testimony, a part of D-19, the objection is likewise sustained, the Court receiving into evidence only the exemplification which excepts the transcript of testimony.

Mr. Wright: For what reason, if Your Honor please?

The Court: That—

Mr. Wright: It's part of an exemplified copy.

The Court: Pardon?

Mr. Wright: It's part of an exemplified copy of the record.

The Court: I am going to set aside that ruling. The Court is sustaining the objection that the testimony as shown by the transcript in D-19 is immaterial. The document will be received in evidence.

Now, that should be given another number, I think.

Mr. Wright: Yes, I think so.

The Court: All the other exhibits are rejected. I will mark it Defendant's E in evidence. Now, would it be of any help if the Court states reasons for the ruling?

Mr. Mahl: May I ask, because I am not quite clear, is your Honor admitting in evidence those portions of D-19 consisting of the Complaint, the Answer, the Decree of Divorce, the Summons?

The Court: I am admitting in evidence the whole of D-19. I am sustaining an objection that the transcript of the testimony is immaterial.

Mr. Mahl: Thank you.

The Court: Otherwise, I think we would have to separate the document and mark the transcript of testimony as an exhibit for identification only; and it seems to me that should clear the record.

Mr. Loring: As indicated in the offer of proof, I have now a certified copy of the marriage record of Harold C. Moore and Carol J. Hoyt in Portland, Oregon, on October 26, 1930; Carol J. Hoyt being the plaintiff in this case.

I should like to hand to the Clerk this document and ask that it be marked for identification in support of the offer of proof.

The Court: D-21 for Identification.

Mr. Loring: I understand that all of the documents presented are being marked for identification?

The Court: That's correct, excepting D-19, which is now marked E in evidence.

Mr. Loring: I think, in response to your Honor's question, that it would be helpful to the defense, at least, if your Honor would explain the basis of your sustaining the objections to the offer of proof.

The Court: The offer, on its face, shows an activity on the part of the defendant in obtaining the Nevada decree which the Court considers constitutes an estoppel.

Second, the Court holds that the defendant, in any event, is not a person who may attack the divorce, not being a party therto, or interested therein,

Third, that under the law, both parties having appeared in the action, and had an opportunity to present all matters, including jurisdictional matters, entitles the Nevada decree to full faith and credit in this and every other state.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 496.

NOAH DIETRICH,

Petitioner,

vs.

CAROL DIETRICH,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI.

Statement of Facts.

Petitioner, Noah Dietrich, and respondent, Carol Dietrich, were married in California May 23, 1936 [R. 2, 23]. They lived together for approximately fifteen years, during which time three children were born [R. 2, 23]. Carol had been previously married to Harold C. Moore. This marriage was dissolved by a Decree of Divorce in the State of Nevada on May 22, 1936 [R. 176]. In that action (*Moore v. Moore*), the defendant Harold C. Moore appeared and filed an Answer [R. 175].

At the hearing on the Order to Show Cause *re* attorney's fees, court costs, alimony *pendente lite,* allowance for support and/or custody of children and restraining

order in the present case, Noah, through the medium of an offer of proof, attempted to challenge the validity of the Divorce Decree in *Moore v. Moore* [R. 40-52]. The Petition for Certiorari herein asserts that this offer of proof was rejected on the grounds that the Nevada Decree was entitled to full faith and credit under Article IV of the United States Constitution (Pet. p. 2). The fact is that the offer of proof was rejected by the Trial Court on three separate grounds, the Court saying:

> "Mr. Loring: I think, in response to your Honor's question, that it would be helpful to the defense, at least, if your Honor would explain the basis of your sustaining the objections to the offer of proof.
>
> The Court: The offer, on its face, shows an activity on [fol. 80] the part of the defendant in obtaining the Nevada decree which the Court considers constitutes an estoppel.
>
> Second, the Court holds that the defendant, in any event, is not a person who may attack the divorce, not being a party thereto, or interested therein.
>
> Third, that under the law, both parties having appeared in the action, and had an opportunity to present all matters, including jurisdictional matters, entitles the Nevada decree to full faith and credit in this and every other state" [R. 52].

The District Court of Appeal of the State of California, Second District, sustained the Trial Court in rejecting the offer of proof and in its award of alimony, court costs, etc., to Carol. The Court predicated its decision upon the grounds that (1) Noah was estopped by his conduct

from challenging the validity of his marriage to Carol because of a claimed invalid prior Decree of Divorce; and (2) in any event, Noah was a stranger to the foreign divorce action of his wife and consequently in no position to collaterally attack the Decree therein [R. 93-106].

The Supreme Court of California granted a hearing following the decision by the District Court of Appeal and in its opinion again affirmed the Trial Court. The Supreme Court predicated its decision upon the following grounds: (1) because of the ceremonial marriage between the parties, coupled with an actual and bona fide assumption of marital relations, the wife was entitled to alimony *pendente lite,* court costs, etc.; (2) the defendant Noah Dietrich, having gone through a marriage ceremony with Carol and having lived with her for so many years as husband and wife, with full knowledge of the circumstances under which the Nevada Decree was obtained, was estopped to challenge the prior Divorce Decree; and (3) public policy of California requires recognition of the second marriage rather than a dubious attempt to resurrect the original marriage [R. 119-128].

It will be noted that neither the District Court of Appeal nor the Supreme Court grounded their respective decisions on full faith and credit under Article IV of the United States Constitution.

It will also be noted that ten Appellate and Supreme Court justices, without a dissent on the features mentioned, have approved the ruling of the Trial Court.

POINT I.

Estoppel, Under the Circumstances Here Existing, Is a Matter of State Policy.

In *Rediker v. Rediker,* 35 Cal. 2d 796, 221 P. 2d 1, the Court said (p. 808):

> " 'We think it may now be stated that the *general* public policy in this jurisdiction, as judicially interpreted, no longer prevents application in annulment actions of the laches and estoppel doctrines in determining the effect to be given such divorce decrees.' (Vinson J., in Goodloe v. Hawk, 113 F. 2d 753, 757; Harlan v. Harlan, 70 Cal. App. 2d 657, 663-664 (161 P. 2d 490); Krause v. Krause, 282 N. Y. 355, 360 [26 N. E. 2d 290].) We conclude that the public policy of this state requires the preservation of the second marriage and the protection of the rights of the second spouse 'rather than a dubious attempt to resurrect the original' marriage."

This declaration of the public policy of California was reaffirmed by the Supreme Court in its decision in this case [R. 124]. In both cases the Supreme Court of California applied the doctrine of estoppel.

In its decision herein, the Supreme Court of California carefully pointed out that it was not considering or passing upon the "force or effect" of the Nevada Decree obtained by Carol but was simply holding that Noah, because of his conduct with relation to that Decree, had no standing to question it. In so doing, the Court gave a very complete answer to petitioner's complaint that the Court refused to apply California Civil Code Section 150.1, which is Section 1 of the Uniform Divorce Recognition Act. Petitioner fails to distinguish between the question of the validity or invalidity of the Nevada Decree on the one

hand and petitioner's right or standing to challenge that Decree on the other.

That the doctrine of estoppel to challenge a prior Divorce Decree is not inconsistent with Civil Code Section 150.1 and that it is the established doctrine in California that a spouse who remarries with knowledge of, and in reliance upon, a Decree of Divorce secured by the other spouse is estopped from contesting the validity of the Decree, is made exceedingly clear by the very recent case of *Union Bank & Trust Company v. Gordon,* 116 Cal. App. 2d 681, 254 Pac. 644, and innumerable authorities cited therein.

POINT II.

State Policy, as Established by Point I, Is a Matter of Local Law and Presents No Federal Question.

In *Israel v. Arthur,* 152 U. S. 355, 14 S. Ct. 583, 38 L. Ed. 474, this Court has held that no federal question arises from a decision of a state Supreme Court holding one to have been estopped to attack a prior divorce by reason of subsequently marrying in reliance thereon. In that case the Court said (p. 478):

> "With the conclusion on the facts we have nothing to do, and the conclusions of law were conclusions in matters of local and general law which suggest no Federal question.
>
> By stipulation of record plaintiff in error admitted at the trial that, the invalidity of the divorce decrees being conceded, the only question to be tried was whether she was "estopped by her conduct as alleged in said answer in dispute or contest the validity of said decrees or whether she has ratified them by her conduct."

That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a state court of principles of public policy and of estoppel, which it is not within our province to do. This was so held in Marrow v. Brinkley, 129 U. S. 178 [32:654], and in effect in many other cases. Adams County v. Burlington & M. R. Co., 112 U. S. 123 [28:678]; Chouteau v. Gibson, 111 U. S. 200 [28:400]; Beaupré v. Noyes, 138 U. S. 397 [34:991]."

POINT III.

The Trial Court Did Not Err in Holding That the Defendant, Petitioner Here, Could Not Attack the Prior Divorce, Since He Was Not a Party Thereto or Interested Therein.

In *Mumma v. Mumma,* 86 Cal. App. 2d 133, 194 P. 2d 24, it is said (p. 135):

> "It has been held that a stranger to a foreign divorce decree can impeach it collaterally for fraud only when it injuriously affects him. Within this rule it has also been held that one who subsequently marries one of the divorced parties has no such interest as will enable him to attack the decree. (Margulies v. Margulies, 109 N. J. Eq. 391 (157 A. 676, 677); Kinnier v. Kinnier, 45 N. Y. 535 (6 Am. Rep. 132); Hall v. Hall, 139 App. Div. 120 (123 N. Y. S. 1056, 1061); 19 C. J. p. 378)."

A petition for hearing by the Supreme Court of California was denied in the *Mumma* case.

To similar effect see:

Shea v. Shea, 60 N. Y. S. 2d 823, 270 App. Div. 527;

Bane v. Bane, 80 N. Y. S. 2d 641;

Mussey v. Mussey, 251 Ala. 439, 37 So. 2d 921;

Perkins v. Benquet Consolidated Mining Company, 55 Cal. App. 2d 720, 132 P. 2d 70, *cert. den.,* 319 U. S. 774;

Cromarty v. Cromarty, 38 Ont. L. Rep. 481, 33 D. L. R. 151.

The principle of *Mumma v. Mumma, supra,* is supported by *Cook v. Cook,* 342 U. S. 126, 72 S. Ct. 157, 96 L. Ed. 146, and *Johnson v. Muelberger,* 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552.

The California District Court of Appeal, in affirming the decision of the trial court, relied upon *Mumma v. Mumma, supra,* and held the defendant, petitioner herein, to be a stranger to the former divorce decree and consequently declared that he had no rights which were prejudiced at the time that decree was made. Consequently, it followed that the defendant, petitioner here, did not fall within the class of persons who could collaterally attack the former Nevada decree.

The fact that the Supreme Court of California did not find it necessary to rely on this point in further support of its position does not detract from the validity thereof.

POINT IV.

The Trial Court Did Not Err in Its Holding That the Nevada Decree Was Entitled to Full Faith and Credit in California.

Neither the District Court of Appeal nor the Supreme Court of California found it necessary to discuss the third ground assigned by the Trial Court as the basis of its ruling. This does not detract from the validity of the holding by the Trial Court.

There was introduced into evidence before the Trial Court as Defendant's Exhibit "E," (1) a copy of the Complaint filed in Nevada in the case of *Moore v. Moore;* (2) a copy of the Answer of the defendant Harold C. Moore filed in said action; and (3) a copy of the Decree of Divorce rendered by the Court on May 22, 1936 [R. 174-176].

The Complaint contained the necessary jurisdictional allegations [R. 174]. The Decree recited the appearance of counsel for both plaintiff and defendant and a finding that all of the allegations contained in plaintiff's Complaint were true [R. 176]. Thus, there was a finding of the necessary jurisdictional facts by the Nevada Court in an action in which both parties appeared by written pleadings and in which both parties were represented by counsel at the time of trial.

The law is now definitely and firmly established by a substantial line of decisions by this Court that where both parties have appeared in a divorce action and the Court has adjudicated its own jurisdiction (which it must do in order to render a decree), such a decree is not only immune to collateral attack by the parties thereto but also by strangers to such decree and such a judgment or decree

must be recognized in all other states on the basis of full faith and credit.

Sherrer v. Sherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429;

Coe v. Coe, 334 U. S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451;

Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561;

Cook v. Cook, 342 U. S. 126, 72 S. Ct. 157, 96 L. Ed. 146;

Johnson v. Muehlberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552;

Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, 96 L. Ed. 448.

Pursuant to the doctrine of the foregoing cases, the Trial Court gave full faith and credit to the Nevada decree. The full faith and credit provision of the Federal Constitution was therefore fully honored. No abridgement of petitioner's constitutional rights under the full faith and credit clause can possibly be claimed. Petitioner could only complain if the full faith and credit provision of the Constitution had not been followed to his injury.

Petitioner claims that the California decision in this case is in conflict with:

Hobbs v. Hobbs, 197 F. 2d 412 (D. C. Cir., 1952);

Staedler v. Staedler, 6 N. J. 380, 78 A. 2d 896;

Alton v. Alton, 207 F. 2d 667 (3rd Cir., 1953);

Davis v. Davis, 259 Wis. 1, 47 N. W. 2d 338;

Oberstein v. Oberstein, 217 Ark. 80, 228 S. W. 2d 615.

Such, however, is not the case. None of said cases are out of harmony with the California decision in this state or with the holding of the United States Supreme Court in the cases above cited.

In each of said last cited cases, the action was by the same husband and wife who had been parties to the original divorce. Thus, the right of a stranger to question a former divorce decree was not involved.

In the *Hobbs* case, *supra,* the appearance by the wife in a former divorce decree had been obtained by intimidation and coercion and because there was not a voluntary appearance, it was held that the Nevada Decree was not entitled to full faith and credit.

In *Staedler v. Staedler, supra,* the Court merely held that the trial court did not err in refusing to apply the doctrine of estoppel because of collusion between the parties. This is far from being equivalent to holding that the application of the doctrine of estoppel, as was held by the California decision, was in error.

Oberstein v. Oberstein, supra, was before the Court of Arkansas and it was a Court of Arkansas that had granted the prior divorce. Full faith and credit of a judgment by a sister state was not involved.

Davis v. Davis, supra, involved a special appearance for purposes of opposing jurisdiction in the former divorce action. The Court held that such special appearance did not meet the test of a general appearance in the action such as was involved in the instant case and in the cases decided by the United States Supreme Court above cited.

POINT V.

The California Courts Did Not Err in Awarding Alimony Pendente Lite and Costs of Suit on the Basis of a Showing of a Ceremonial Marriage Between the Parties.

Predicated upon more than ample authority, the Supreme Court of California held that an award of alimony *pendente lite,* attorney's fees, costs of suit, etc., was entirely proper and in the interest of society and in aid of public policy where it was shown that the parties had engaged in a ceremonial marriage, the validity of which was challenged by the husband. The Court held that the wife should be furnished with means of temporary support and for conducting the suit until the truth or falsity of her allegations of an existing marriage could be ascertained by proof formally taken in the case [R. 123, 124].

It is an admitted fact in this case that the parties engaged in a ceremonial marriage, lived together for a period of approximately fifteen years, and raised a family of three children.

Only upon the seeking of separate maintenance by the wife did the husband, petitioner here, raise any question as to the validity of their marriage.

Under such circumstances, compelling the husband to support the wife *pendente lite* and to provide her with the means of prosecuting her action, is a matter of public policy to be determined by each state and presents no federal question.

Conclusion.

Tested by the authorities herein cited, petitioner's claim that he was denied due process and equal protection of the laws under the United States Constitution becomes

purely fictitious. Ten California judges and justices have unanimously held otherwise. The position of the Trial Court, the District Court of Appeal, and the Supreme Court of California are in exact accord and consistent with the established law of California. Petitioner has had his day in Court—in fact, has had his day in three courts, including the highest Court of this state. Every requirement of due process has been fully met.

Petitioner is not seeking "equal protection of the law." He is seeking special rules in his behalf. He seeks to avoid an estoppel, which, as a matter of state policy, has been consistently applied against spouses who marry in reliance upon a divorce decree obtained by the other spouse. He seeks to avoid the rule, consistently followed in California, that a husband must support his wife *pendente lite* and furnish her with suit money when there has been a ceremonial marriage and the parties have lived as husband and wife. He seeks to avoid the rule, approved by both the California courts and the United States Supreme Court, that a stranger to a divorce decree may not collaterally attack such decree. He seeks to avoid the full faith and credit provisions of the United States Constitution as applied to divorce cases where both parties were before the Court.

We submit that the petition for certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

JENNINGS & BELCHER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 496

NOAH DIETRICH, *Petitioner*

v.

CAROL DIETRICH, *Respondent*

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 496

NOAH DIETRICH, *Petitioner*

v.

CAROL DIETRICH, *Respondent*

PETITIONER'S REPLY BRIEF

INTRODUCTION

In his application for a Writ of Certiorari petitioner alleged that this case involved important questions concerning the proper application of the Full Faith and Credit, the Due Process and the Equal Protection Clauses of the Constitution of the United States.

In her Answer respondent has asserted that the decision of the California Supreme Court was based solely upon state grounds and that, accordingly, no federal questions are involved herein. This assertion raises a basic jurisdictional problem. Petitioner did not deal with the question in his Petition for Certiorari because there has never been any doubt in his mind that important federal questions

are involved herein. However, he will now briefly discuss this problem.

I.

Of The Non-Federal Grounds Alleged By Respondent As The Bases Of The Decision Of The California Supreme Court, One Was Deliberately By-Passed By That Court And The Other Was Specifically Held By It Not To Be Controlling

The trial court and the District Court of Appeal both ruled that since petitioner was not a party to the prior Nevada divorce decree he had no standing to collaterally attack it by questioning the validity of his purported subsequent marriage to respondent. Having declared petitioner estopped to question the Nevada decree, the California Supreme Court held it "unnecessary" to pass upon the correctness of any other ruling of the lower court. The highest California Court, therefore, deliberately by-passed one state ground now claimed by respondent as adequately supporting the state court's decision.

Respondent contends that the California Supreme Court simply ruled in this case that *because of the factual situation here involved* the petitioner could not question at a *pendente lite* hearing the validity of his marriage to respondent. Respondent argues that this is nothing more than a ruling by a state court on a matter of state procedure involving no federal question whatsoever. Unfortunately, the California Supreme Court did much more than tie this petitioner's hands at a *pendente lite* hearing when (after discussing the procedural question) it specifically ruled as follows:

> "There is, however, another and more fundamental ground [i.e., estoppel] which not only is controlling at this stage of the proceedings but presumptively will be controlling on the trial as well." (R. 124)

It is manifest, therefore, that the California Supreme Court itself did not rest its decision on the narrow, non-

federal, procedural ground now urged by the respondent, but that it deliberately chose to attempt to apply a doctrine of estoppel to petitioner in perpetuity.

II.

As Applied To The Factual Situation Admittedly Involved In This Case The Non-Federal Doctrine Of Estoppel Is Plainly Untenable

The California Supreme Court specifically held that since, at the time of his purported marriage to the respondent he had knowledge of the factual circumstances under which she had procured her Nevada divorce, petitioner was estopped from even questioning the validity of his marriage to the respondent (R. 124). This determination which implies that petitioner knew of the invalidity of respondent's prior Nevada divorce is in direct conflict with petitioner's rejected offer of proof which under California law must now be accepted as true.

Respondent's basic contention is that in holding petitioner estopped the California court was only determining local state policy and was not deciding a federal question. Petitioner agrees that estoppel may or may not be an adequate non-federal ground to support a decision of a state court. However, the jurisdiction of the United States Supreme Court to review a final judgment of the highest court of a state (which court affirmed a lower court's judgment that erroneously determined a federal question) cannot be defeated by the fact that the highest state court based its final judgment on a non-federal ground which is plainly untenable. *Lawrence* v. *State Tax Commission*, 286 U.S. 276; *Union Pacific Railroad* v. *Public Service Commission of Missouri*, 248 U.S. 67; *Ward* v. *Love County*, 253 U.S. 17; and *Abie State Bank* v. *Bryan*, 282 U.S. 765.

As Mr. Justice Carter of the California Supreme Court in his separate concurring and dissenting opinion (R. 126-128) has pointed out, the application of the doctrine of estoppel to the petitioner in this case is clearly untenable because the factual situation admittedly involved does not

contain two elements which are ordinarily and universally considered indispensable elements of estoppel, namely: (1) ignorance, innocence and good faith on the part of the person invoking the estoppel, and (2) knowledge and bad faith on the part of the person estopped.

From the rejected offer of proof (R. 40-52) it conclusively appears that the respondent was not ignorant nor innocent nor a good-faith actor when she deliberately perpetrated a fraud on the Nevada court. It also definitely appears from the offer of proof that petitioner had no knowledge of the invalidity of the respondent's prior divorce until about a month prior to the hearing of this case in the trial court (R. 30), that he in no way participated in the fraud on the Nevada court (R. 42; 50-51; 127) and that, in fact, he had unsuccessfully attempted to persuade respondent to procure her divorce in Texas where she intended to make her permanent home (R. 42).

In spite of these judicially unassailable facts the California Supreme Court applied the doctrine of estoppel to petitioner. The application of the doctrine of estoppel to petitioner appears to be all the more arbitrary and discriminatory in view of the fact that barely four months before its decision in this case the California Supreme Court had denied a hearing in the case of *Union Bank & Trust Company v. Gordon*, 116 Cal. App. (2d) 681, 254 P. (2d) 134 in which the District Court of Appeal had refused to apply the doctrine of estoppel against a second spouse who knew her husband had obtained a prior Nevada divorce but who the petitioner did *not* know that the prior divorce might be invalid, and in which the District Court of Appeal said:

> "When we note the great difficulty courts and lawyers have had in determining when an out of state divorce decree is or is not valid, it would be incongruous indeed to charge a lay woman [Noah] with absolute knowledge merely because she [Noah] knew that a divorce decree had been rendered by a state other than that of the residence of the parties."

With two indispensable elements of estoppel missing from the factual situation involved in his case, petitioner naturally maintains that the doctrine of estoppel is plainly untenable as applied to him, particularly in view of the California Supreme Court's approval of the decision of the District Court of Appeal in the *Union Bank & Trust Company* case, *supra*.

CONCLUSION

In addition to the above detailed defects, respondent's Answer completely ignores petitioner's argument that the very attempt to place the state court judgment on a non-federal ground *per se* constituted a denial of additional constitutional rights in petitioner.

Accordingly, petitioner reasserts that there are basic and important federal questions involved in this case and he again prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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